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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 746.

THE PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, and THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, *Appellants*,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO, JOHN W. BRICKER, Attorney General of the State of Ohio, and PITTSBURGH COAL COMPANY, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEE, PITTSBURGH COAL COMPANY.

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April 4, 1936.

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THE PUBLIC UTILITIES COMMISSION OF OHIO, JOHN W. BRICKER, Attorney General of the State of Ohio, and PITTSBURGH COAL COMPANY, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEE, PITTSBURGH COAL COMPANY.

Pittsburgh Coal Company (hereinafter called the "Coal Company") became a party defendant in this suit by reason of its intervention in the District Court below. Its petition for intervention, together with a sworn answer to the Bill of Complaint, were presented to the District Court on September 23, 1935, the date of the final hear-

ing of the case in that Court. The intervention, however, was not allowed until December 11, 1935 (R. 56), the date of the final decree (R. 69). The said petition and answer were ordered filed on that date (R. 61).

The Limited Scope of this Brief.

As this Appellee is in substantial accord with the positions taken by the appellees, Public Utilities Commission of Ohio, and John W. Bricker, Attorney General of the State of Ohio, this brief will be confined largely to matters not dealt with in the brief of the said appellees.

The Interest of the Coal Company in this Suit.

The Coal Company, as shipper and vendor of the four carloads of prepared coal, involved in this suit, and as the owner of the processing plant located at Negley, Ohio, from which the prepared coal was sold into the market, and as a prospective shipper of prepared coal to be similarly sold into the market from that plant, has a vital interest in the determination of the question here presented. The difference in the switching cost at Youngstown (as illustrated in the case of the four cars involved) between the intrastate switching rate of $7.65 per car and the interstate road haul charges which amount to $94.50 per car, considering the volume of tonnage which the Coal Company may reasonably expect to sell from its plant to the Youngstown markets, clearly shows the vital interest of the Coal Company in the questions involved (R. 116-117, 181-182).

Statement of the Case.

This Appellee adopts the statement of the case made in the brief filed herein by the Appellees, Public Utilities Commission of Ohio, and John W. Bricker, Attorney General of the State of Ohio.

This Appellee will, however, call attention to the improper and prejudicial use by Appellants of matters which

are not in evidence in this case; and point out certain inaccuracies of statement of fact made by Appellants in their brief concerning the method and conduct of Appellee's business and respecting its past corporate relationship with the Pittsburgh, Lisbon and Western Railroad Company and the Youngstown and Suburban Railway Company.

CONCERNING THE USE MADE IN THIS CASE BY APPELLANTS OF THE FINDINGS OF FACT OF JUDGE WEST IN THE CASE OF PENNSYLVANIA RAILROAD COMPANY AND PITTSBURGH AND LAKE ERIE RAILROAD COMPANY VS. PITTSBURGH, LISBON, AND WESTERN RAILROAD COMPANY, ET AL., IN EQUITY NO. 4533 IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In a topic in Appellants' brief labeled "Intercorporate Relations—Pittsburgh Coal Company, Etc.," (Appellants' Brief, Page 9), a lengthy recital is made of past relations (dating back to the year 1927) between the Coal Company, and the Youngstown and Suburban Railway Company (hereinafter called the "Y & S") and the Pittsburgh, Lisbon and Western Railway Company (hereinafter called the "Lisbon"), the stock of which carriers is either wholly or largely owned by the Coal Company. By the manner in which the recital is made in Appellants' brief and by the use of page references to the record, the impression is given that the Appellants are summarizing testimony introduced below as evidence in this suit, either before the Commission or the District Court. Such, however, is not the case. The recital is in large part of matter selected and culled from the Findings of Fact made by Judge West in the case of *Pennsylvania Railroad Company and Pittsburgh and Lake Erie Railroad Company v. Pittsburgh, Lisbon and Western Railroad Company, et al.*, in Equity No. 4533 in the United States District Court for the Northern District of Ohio, Eastern Division (R. 212).

The record in the instant suit may be searched in vain for even a suggestion that the Findings of Fact in that case have been introduced or received as evidence in this suit, or that the parties to this suit have agreed that they should be considered as such. The truth of the matter is that the Findings of Fact in that case found their way into this record not as evidence in this suit, but as explanatory of the short memorandum opinion (R. 209) and final decree (R. 211) of Judge West, who in that case dismissed the bill of the trunk-line carriers and refused to grant either a temporary or permanent injunction against the construction and operation by the Coal Company of its private railroad tracks serving its coal preparation plant at Negley, Ohio.

For three additional reasons this Appellee submits that Appellants are attempting an improper use of matter not here in evidence or in issue in this suit.

In the first place, Appellants are attempting to broaden the scope of the appeal beyond the limits of their Assignments of Error and to change the theory of their case on appeal by advancing in this Court a new theory for the first time.[1] That this is so is readily demonstrated by reference to the Assignments of Error (R. 221) and Statement of Points Relied Upon (R. 229), and by reference to the conduct of the trial of the case below where Appellants offered no evidence concerning the matters they now desire to stress and placed no reliance on those matters in oral or written argument (R. 120-121).

In the second place, the Findings of Fact of Judge West cannot, in any sense, be said to represent, at the time of the events involved in this suit, the facts respecting the relationship between the Coal Company and the two railroad companies whose stock it owns. Those findings were made in January 1934 upon evidence taken by deposition in the

[1] It is well settled that where a case is tried on one theory in the Court below, another theory cannot be substituted in the appellate court. See *Merriman* v. *C. & E. I. R. Co.*, 14 C. C. A. 36, 24 U. S. App. 641, 66 Fed. 663; *United States* v. *Hall*, 11 C. C. A. 294, 21 U. S. App. 402, 63 Fed. 472; *Ford Motor Company* v. *Farrington*, 245 Fed. 850 (C. C. A. 9th).

midsummer of 1933. The events involved in the instant suit took place in September of 1934 (R. 147, 173). The hearing of the instant case before the Commission was held in October 1934, and the hearing before the District Court was held in September 1935.

Clearly the lapse of time is so great as to make any use of these findings, as evidence in this case, both unfair and prejudicial. Especially is this so where, as here, the facts have changed in the meantime. As we shall show later, *infra* Page 6, this brief, the once existing corporate relationship between the Coal Company, and the Lisbon and Y. & S. to which the Appellants point, was changed in the month of November, 1933, and thereafter the only relation between the Coal Company and the two named carriers was one of stock ownership. That change occurred almost a year before the events involved in the instant suit took place.

Attention is called to the fact that competent witnesses were available before the Commission who could have been examined by the Appellants as to the circumstances then existing respecting corporate relationships and Appellants could have offered evidence as to such matters. The Appellants, however, did not choose to bring out the existing facts, or make any point of those relationships (R. 120-121).

In the third place, wholly aside from the manifest injustice of an attempt to make evidence out of that which is not evidence, it is apparent that the manner of use by the Appellants of Judge West's Findings of Fact is prejudicial and unfair to the Appellees. Had the Appellants offered evidence before the Commission or the District Court respecting the corporate relationship of the Coal Company, the Y & S and the Lisbon, the Coal Company then would have had reason to offer and would have offered evidence respecting the existing facts. However, as has already been shown, the Appellants not only did not offer evidence respecting those corporate relationships, but expressly disavowed any imputation of unlawfulness concerning them,

and thereafter placed no reliance upon them either before the Commission or the District Court (R. 120, 121).

Inaccuracies of Statement of Fact.

At Page 27 of Appellants' brief, it is said, with reference to their statement of facts, that "There is no controversy between the parties as to facts so stated and as disclosed by the record." Sometimes, however, as already indicated, there exists a difference between the "facts so stated" by Appellants in their brief, and the facts "as disclosed by the record."

At pages 10 and 11 of Appellants' brief, Finding of Fact No. 11 of Judge West, in the case of *The Pennsylvania Railroad Company and The Pittsburgh & Lake Erie Railroad Company* v. *The Pittsburgh, Lisbon & Western Railroad Company, et al.*, in equity No. 4533 in the District Court of the United States for the Northern District of Ohio, Eastern Division, (R. 215-216) is embodied almost verbatim in a paragraph purporting to be a statement of facts based upon the evidence in this case.

We have already pointed out that such use of the Findings of Fact in that case is improper. In this connection, however, we call the Court's attention to the fact that the matters there recited, even if once true, did not exist for almost a year prior to the happening of the events involved in the instant suit. After the month of September, 1933,[1] there was not (and there has not been since) any community of officers or directors, nor was there any use of common office space, between the Pittsburgh Coal Company, and the Lisbon and Y & S.

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[1] Since September 1933, there have been no officers, directors or employees of the Coal Company who are also officers, directors or employees of the Pittsburgh, Lisbon and Western Railroad Company or the Youngstown and Suburban Railway Company; nor has the Coal Company had any joint or adjoining offices with those companies. The fact is that none of the officers, directors or employees of the Pittsburgh Coal Company have any interest in or connection with the two carriers. Although these statements are not based upon anything in the record in the instant case, they are supported by the Annual Reports of the two carriers for the years 1932, 1933, 1934 and 1935, which are on file with the Interstate Commerce Commission as a matter of public record.

In respect to the matters stated by Appellants pertaining to the corporate relationship between the Coal Company, and the Y & S and the Lisbon, it should be noticed that in that case Judge West refused to find the existence of any unlawful domination and control and concluded in his Finding of Fact No. 12 (R. 216):

> "That none of the common carrier defendants has or has had any direct interest or participation in the said enterprise complained of; that none of said carrier defendants is an agent or instrumentality of, or has been dominated by, the defendant Pittsburgh Coal Company respecting said enterprise; nor is the defendant Pittsburgh Coal Company an agent or instrumentality of, nor has it been dominated by, any of said common carrier defendants respecting the same."

We refer to this finding of fact not as evidence in this case, but as explanatory of the facts found by Judge West and only partially recited by Appellants in their brief.

It is said by Appellants that the coal involved in this suit was run through the preparation plant at Brush Run and then "dropped in cars suitably placed by the Lisbon and under Lisbon's power moved to and through Negley by employees of the Lisbon * * *". (Appellants' brief, Page 28.) The fact is, however, and the record shows, that the Lisbon did not place the cars where the coal could be dropped into them from the preparation plant. The manner in which the cars were loaded was as follows: The Lisbon turned over the empty cars to the Coal Company at the point of connection between the line of the Lisbon and the Coal Company's private switch track leading to the Brush Run preparation plant (R. 140). This plant is located some 2,000 or 3,000 feet distant from that point of connection (R. 138). The Coal Company's employees then hauled the empty cars by the Coal Company's engine over the private switch track into the plant where the cars were loaded (R. 139-140). After the cars were loaded at the plant the Coal Company's engine re-

turned the loaded cars back over the switch track to the point of connection with the line of the Lisbon (R. 139-140). Shipping orders were then given to the Lisbon for the common carrier transportation of the loaded cars (R. 139-140).

Appellants state, at Page 33 of their brief, that the Coal Company indirectly " * * * in due course by its own funds mingled with those of the Lisbon" constructed a link of railroad between Columbiana and Signal in Ohio. We shall deal later with the matter of the construction referred to, but here we respectfully invite inquiry by this Court of the Appellants as to where in the record or elsewhere there is so much as a syllable of evidence to justify the charge that the Coal Company ever "mingled" its funds with those of the Lisbon or vice versa.

Further, in Appellants' brief the statement is made (Page 33) that "* * * the Coal Company arranged for the movement from mines of origin through Smith's Ferry and its Brush Run washer to Negley, without bills of lading, * * *." It is perhaps fanciful, but we would ask Appellants just how and for what reasonable purpose a private industrial company would go through the farce of issuing a bill of lading to itself to cover a movement of its own coal over its own non common carrier mine tracks to its own river tipple, and thereafter by its own private barges and private non common carrier plant tracks to its own plant. The carriers seem to forget that the issuance of a bill of lading is not a ritual required to be performed before goods can be moved from one locality to another. Clearly a bill of lading is a transportation contract requiring the existence of two parties, one a shipper and the other a carrier. It is, of course, not only impossible but useless for a person to contract with himself; and the issuance by the Coal Company of bills of lading to itself for the movement of its own coal from its mines to its plant would manifestly be nothing but solemn nonsense. *M. D. Friedman Co.* v. *C. & O. Ry. Co.*, 194 I. C. C. 455.

If, however Appellants are implying that the Coal Company should have handled the transportation of its run of mine coal from its mines to its Brush Run plant by issuing bills of lading to Ohio purchasers of its prepared coal, we point out that no one but the Coal Company had any rights or interest whatever in the coal transported to the plant; that there were no such purchasers of the run of mine coal; that the Coal Company owed no duties to anyone in respect to its private transportation of its run of mine coal to the plant. Reference to the record discloses that the raw coal was not sold or even contracted to be sold (R. 147-148). Only the prepared coal, the product of the Brush Run plant, is sold or contracted to be sold (R. 153), for the raw coal from which it is prepared is not readily salable in northeastern Ohio (R. 149). The raw coal which was moved to the Brush Run plant was not "shipped" over the plant tracks of the Coal Company by or to any purchaser or prospective purchaser (R. 150). There is nothing in the record to suggest that the Coal Company did not at all times have the right, had it so desired, to take the identical raw coal which was moved up to the Brush Run plant and there destroy it or move it back to Pennsylvania or dispose of it to any person or in any manner it saw fit, without incurring any liability to its customers, who eventually purchased the four carloads of prepared coal, or to anyone else.

ARGUMENT.

I. THE COAL COMPANY'S PROJECT FOR MARKETING COAL IN OHIO MARKETS IS OF A PRIVATE INDUSTRIAL CHARACTER.

The Coal Company, for reasons that are explained herein, is desirous of disposing of its coal in northeastern Ohio markets and beyond. As will be shown from the evidence, the modern requirements of coal consumers are such that coal in the nature and form in which it is taken from the mines is no longer a readily marketable product.

Modern marketing conditions and modern methods of fuel consumption require that coal be prepared and processed into a new and different product from the raw run of mine coal. This change is effected by industrial plants known variously as preparation plants, coal cleaning plants, or coal washers.

It goes without saying that the Coal Company, like any other company, is interested in the question of seeing that its operations are conducted as economically and as efficiently as possible. Because, as will be shown, the Coal Company has long owned and operated its own river fleet of steamboats and coal barges, it is desirous of making use, as far as possible, of its own cheap river transportation along the water ways in any movement of its coal to markets in Ohio or elsewhere. Such a movement enables the Coal Company to move its commodity at cost.

It hardly need be explained that private carriage is neither unlawful, against public policy, nor economically undesirable, however distasteful it may be to the trunk line carriers.

In the last analysis the refusal of the trunk line carriers to switch the four carloads of prepared coal involved in this suit is based solely upon the ever-existent hostility on the part of those carriers to any movement of a commodity that takes place by any means other than over their rails. The pretext for the refusal in the instant case happens to be the asserted question concerning the alleged interstate character of the movement of these four cars by common carrier railroads between two points in the State of Ohio.

Because of the many assertions in Appellants' brief concerning the motives of the Coal Company in marketing coal in Ohio, we propose to show from the testimony just what the Coal Company is doing and why it is doing it. Due to the fact that the Appellants, in their brief have repeatedly referred to coal preparation plants as if they were mechanical arrangements of some sort through which coal is "transferred" and incidentally washed with water and

sorted into sizes, we shall also make clear from the testimony the nature of the preparation process effected at such plants.

Testimony relating to the Coal Company's Brush Run Plant and its plant tracks.

The Coal Company is the owner of seven coal mines located on and accessible to the Monongahela River in Pennsylvania (R. 144). As the coal produced from those mines is a gas and by-product coal, it finds a logical market in northeastern Ohio, not only because the steel and manufacturing industries in that area are dependent upon coal of that kind and quality, but also because coal of that character is not produced in Ohio (R. 144).

It is to the great business advantage of the Coal Company to increase its sales of coal from those mines in the markets of northeastern Ohio for the reason that the Coal Company owns and operates its own barges and steam towboats on the Monongahela and Ohio Rivers (R. 145). In moving such coal to those markets, the Coal Company is therefore able to utilize the cheap river transportation (R. 144) made possible by the long river routes which run in the direction of the State of Ohio.

However, the coal produced in western Pennsylvania fields is not readily merchantable to the steel and other industries in the raw run of mine form in which it is taken from the mines (R. 145). If modern consumer demands, and modern methods of combustion are to be met, the run of mine coal must be prepared and sized to suit the needs of each particular consumer (R. 145-146).

In order to be able to sell its coal from its Monongahela River mines into the markets in northeastern Ohio, the Coal Company built a modern coal preparation plant at Negley, Ohio (R. 145).

The Brush Run plant was located near Negley, Ohio, for several reasons.

In the first place, the market for coal from these river mines is in northeastern Ohio. (R. 144-145) In the second place, the Coal Company desired a central preparation plant to serve its seven river mines (R. 149). It has been the policy of the Coal Company in the past to locate its preparation plants at places where each plant may be used to serve several mines rather than one mine alone (R. 149). The Coal Company's Champion Plant, for example, serves four inland mines (R. 149). Location of plants at central points makes, of course, for economies in operation and for savings in capital investment (R. 149). In the third place, a preparation plant designed to serve the output of the several river mines of the Coal Company must of necessity be located beyond the point of river-to-rail transfer if the prepared product of the plant is to be marketed as a prepared product (R. 153-154). This arises from the fact that the transfer from river barges to rail cars entails breakage and degradation of prepared coal to such extent that the retail dealer or consumer refuses to accept coal which is so broken that it is no longer coal of the same size which the dealer or consumer had ordered and which had been shipped from the plant (R. 153-154); hence, no preparation facilities exist or would be desirable at or near any of the river mines (R. 149, 143). As the preparation of coal at Brush Run takes place beyond the point of river-to-rail transfer, the Coal Company has avoided the degradation and destruction of the accurate sizing which would take place upon any transfer of a prepared coal from barges to rail cars (R. 170).

In the fourth place, the successful operation of a preparation plant requires that there be an abundance of cheap land available upon which the very considerable quantity of waste material which is taken from the run of mine coal can be disposed of cheaply without subjecting the Coal Company to nuisance suits because of the attendant air and water pollution (R. 169). The Brush Run site furnishes an ideal plant location in this respect in that the surround-

ing country is little inhabited and abundant inexpensive land for the storage of coal and coke and the dumping of waste material is available (R. 169-170). No such site exists along the Ohio River bank near Smith's Ferry, Pa. (R. 169-170).

The function of the Brush Run preparation plant is to transform raw run of mine coal into a readily merchantable product of the exact quality and size that the combustion facilities of the particular consumer demand (R. 145). Run of mine coal passing through the Brush Run plant is subjected to two distinct processes by which the character of the coal is changed (R. 154-162). By one process extraneous mineral matter and impurities, such as dirt, sulphur, slate, rock, pyrites, mica, calcite, and gypsum are removed from the coal (R. 154). In the normal operation of the plant about 4 per cent of all raw coal that is introduced into the plant is removed in the form of waste material which is discarded (R. 154). By another process the coal is accurately sized and the sizes mixed according to the specific demands of any particular consumer (R. 146). This plant is equipped to make any of 25 different sizes, and all combinations of different sizes and qualities by mixture of the various sizes and qualities in any desired proportions (R. 146-147).

As a result, the coal which comes out of the plant, is coal of a different character and size than the coal which entered the plant (R. 146). The run of mine coal which goes into the plant comes from several mines and is an accidental mixture of all kinds of coal of several sizes (from the finest dust to huge lumps) and of various impurities (R. 146). The resultant product of the preparation process, however, is a refined product of definite quality and size.

It is the Coal Company's intention to locate a plant at Brush Run for the carbonization of coal at low temperatures and the manufacture of a new smokeless carbon fuel, which the Coal Company is successfully manufacturing at the present time at another plant (R. 154-155).

For the information of the Court the Appellee has attached two photographs of the Brush Run plant in an Appendix to this Brief.

The product of the Brush Run plant is shipped to Ohio points over the line of the Lisbon with which the plant is connected by a switch track which is private to the Coal Company (R. 166). The run of mine coal is brought into the plant by plant tracks extending southwardly 10 miles to the Coal Company's unloading dock located on the Little Beaver River near its confluence with the Ohio River at Smith's Ferry, Pa. (R. 145). This track, together with the switch track which connects the plant with the Lisbon, is privately owned and operated by the Coal Company (R. 146, 153). The equipment used on these tracks consists of hopper cars and an engine which are likewise owned and operated by the Coal Company (R. 139). The Lisbon in no way operates over the switch track to the plant or over any other portion of the plant tracks; and did not operate over those tracks in the movement of the four carloads of prepared coal involved in this suit (R. 140).

Testimony relating to the four carloads of prepared coal prior to its shipment on the Lisbon.

The coal involved in this suit was mined from the Coal Company's river mines located on the Monongahela River in Pennsylvania, in the current course of operation of the mines (R. 147, 151). At those mines the coal is taken from the ground at points as far distant from the river as six and one-half miles (R. 151-152). The coal is then moved several miles under ground and brought to the surface at points still several miles distant from the river (R. 152). It is moved to the river over the privately owned and operated mine tracks of the Coal Company (R. 152).

At the river the coal, which is still in the run of mine form in which it was taken from the mines, is then transferred by

a private tipple, which the Coal Company owns and operates, from the mine-cars into the Coal Company's private river barges (R. 152).

The coal involved in this suit was originally some unascertained portion of 239 tons of run of mine coal which was loaded into a barge from the tipple on August 2, 1934 (R. 147, 149). The coal was then moved by the Coal Company's privately owned and operated steamboat down the Monongahela River to the Coal Company's river harbor at Risher, Pa., where it lay until August 25, 1934 (R. 147-148).

On August 25, 1934, it was started on its movement down the Monongahela and Ohio Rivers by the Coal Company's steamer to the Coal Company's loading dock at Smith's Ferry, Pa., near the confluence of the Little Beaver River and the Ohio River (R. 147). This movement, as well as the subsequent movement of the coal, can be traced graphically on the sketch which is attached in an Appendix to this brief.

Some time between the time when the barge left the Risher harbor in Pennsylvania and arrived at the Brush Run plant in Ohio, the Sales Department of the Coal Company obtained orders for four carloads of prepared coal of specific quality and size (R. 148). These orders or contracts to sell were not, however, for run of mine coal, nor did they obligate the Coal Company to process and thereafter deliver a prepared product made from the particular barge load of coal before mentioned (R. 147, 148, 149, 150).

The particular barge load of 239 tons of run of mine coal was not during this time or at any later time either sold or contracted to be sold in whole or in part (R. 148). The consumer of prepared coal is not particularly interested in the question of from what run of mine coal the prepared product is made, and from his standpoint is interested only in the quality and size of the prepared product which leaves the plant (R. 149). When the coal contained

in the particular barge that went to Smith's Ferry, was moved from the mine tipple, it could not be told where or to whom any particular portion of the coal was going (R. 150). In the current course of operation of the mines and plant, the Coal Company does not even know, at the time of arrival of the run of mine coal at the Brush Run plant, just where the resulting cars of different qualities and sizes of coal that is turned out of the plant may ultimately go (R. 151, 157, 158).

Only the prepared product of the plant is sold or offered for sale (R. 159, 150). The customer takes the prepared coal f.o.b. the tracks of the Lisbon (R. 150).

Without in any way being the subject of sale or barter, the 239 tons of run of mine coal were removed from the barges at the Coal Company's unloading dock at Smith's Ferry, Pa., and transferred to its private cars on the Coal Company's plant tracks and moved by the Coal Company's engine to the Brush Run plant in Ohio (R. 146). On arrival at the plant, the coal was dumped into a large concrete pit, and taken into the plant by a belt conveyor (R. 146).

From the barge load of 239 tons of run of mine coal which arrived at the plant, there was prepared one car of furnace coal, one car of block coal, and two cars of mixed nut, stoker, and slack coal (R. 167; Ex. 8, R. 198; Ex. 12, R. 201; Ex. 15, R. 202; Ex. 17, R. 203). The contents of these four carloads did not, however, account for all the coal that went into the plant (R. 146, 149) from the particular barge load of 239 tons of run of mine coal. There was, of course, the usual wastage of foreign material to the extent of about 4 per cent of the whole (R. 146), and in addition, another partial carload of prepared coal which was not sold (R. 149). That coal which was loaded out of the plant was not the same kind, form, or size of coal which had entered the plant (R. 146).

It was these four carloads of prepared coal above mentioned that were sold out of the plant, and thereafter shipped to purchasers via the Lisbon (R. 150). No com-

mercial dealings of any sort took place in respect to the run of mine coal which went to the plant (R. 161). Only prepared coal was the subject of barter and sale, and the Coal Company's ownership of that product did not cease until after commitment to the common carrier Lisbon for shipment (R. 153).

II. THE OWNERSHIP BY THE COAL COMPANY OF THE STOCK OF THE LISBON AND THE Y. & S. IS IRRELEVANT TO THE ISSUES OF THE CASE.

We have already commented upon the obviously improper use (as if evidence in this case) of certain Findings of Fact of Judge West in a suit brought by The Pennsylvania Railroad Company and The Pittsburgh and Lake Erie Railroad Company to enjoin the construction of the Coal Company's private plant tracks serving the Brush Run plant, as a violation of Section 1 (18) of the Interstate Commerce Act. It has been shown also that at the time of the events out of which the instant case arose, the corporate relationship between the Coal Company, and the two carriers whose stock it owns had ceased to be other than that of stock ownership.

However, whether proper or not, the injection of these matters of past history into the case is not only immaterial but also irrelevant to the issues presented.

The point which Appellants apparently desire to make of these past matters is stated on Page 27 of their brief where they refer to the private movement of the raw coal and the subsequent shipment of prepared coal over the Lisbon as "an attempt to evade the lawful interstate charges for switching at Youngstown".

The Proposed Extension of the Lisbon in 1929.

Appellants make much of the once proposed extension of the common carrier Lisbon whose stock the Coal Company

owns. Appellants say that the once proposed extension of the common carrier Lisbon is the same thing in point of law and fact as the operation by the Coal Company of its Brush Run preparation plant and the plant tracks appurtenant thereto. We shall analyze the charge.

Admittedly the Coal Company favored that extension. The proceedings before the Interstate Commerce Commission for the purpose of obtaining the consent of that body to the proposed extension were openly and frankly favored by the Coal Company, as well as by numerous Youngstown industries, as reference to the report of the Commission in *Construction of Branches by Pittsburgh, L. & W. R. Co.*, 150 I. C. C. 43, will show.

Briefly, the proposed extension of the Lisbon contemplated the construction of a new line of railroad about 40 miles in length and connecting the Ohio River at Smith's Ferry, Pa., with Youngstown, Ohio. This would have permitted western Pennsylvania coal moving, for example, from Connellsville, Pa., to Youngstown, Ohio, as it now moves on an all-rail haul of 140 miles, to have been moved by a river and rail route of 100 miles by river and 40 miles over the proposed line of the Lisbon, with considable saving in coal transportation costs.

The Pittsburgh and Youngstown districts are competitive iron and steel manufacturing communities, each of which consumes many millions of tons of bituminous coal annually. The principal source of this coal is the mines of western Pennsylvania and mainly the river mines located along the Monongahela River. As the mills of the Pittsburgh district are located along the Monongahela, Allegheny and Ohio Rivers as far down as Wheeling, W. Va., they have long enjoyed cheap water transportation of coal from the western Pennsylvania mines located on the upper Ohio River system of inland waterways. Youngstown, however, being located some 40 miles inland from the waterways system, had always been denied the boon of the cheaper water transportation. In consequence, it has suf-

fered in competition with its Pittsburgh district competitors because of the greater cost of transportation which it must pay to secure coal. The proposed extension of the Lisbon was designed to remedy that situation.

Although the Interstate Commerce Commission refused to authorize the proposed extension of the common carrier Lisbon, it found:

> "Public convenience and necessity, in the broader sense, require the combined use of all the agencies which can contribute to adequate and efficient transportation at the lowest cost." *Construction of Branches by Pittsburgh, L. & W. R. Co., supra,* p. 53.
>
> "The evidence shows that it is practicable and desirable that the Youngstown district should have access to the Ohio River by rail line or lines which will afford them substantially the transportation advantages, including rates proposed by the applicants in this case. The advantages of the utilization of the Ohio and its connecting waterways have been amply demonstrated and the rail carriers should realize that they can not continue to handle by all-rail routes much traffic which can be more economically transported by all-water or rail-and-water routes. The interveners [*i. e.,* these Appellants] express fear that lower rates over a rail-and-water route will jeopardize the present rate structure, but, assuming such fear to be well founded, that fact would not justify us in withholding approval of any plan which promises to reduce substantially the cost of necessary transportation." *Construction of Branches by Pittsburgh, L. & W. R. Co., supra,* pp. 54-55.

The Youngstown & Suburban Connection With the Lisbon.

Thereafter, the Y. & S. extended its interurban electric line from Columbiana to Signal, Ohio, about 6½ miles to connect with the Lisbon at Signal, Ohio. This extension was made without seeking authority therefor from the Interstate Commerce Commission for the reason that such permission was not necessary because of the provisions of Section 1 (22) of the Interstate Commerce Act. Subse-

quent to that extension, the Interstate Commerce Commission, in another proceeding where a similar question arose, found that the position taken by the Y. & S. in this respect was correct, saying in *Youngstown and Suburban Railway Company Operation*, 175 I. C. C. 699:

> "The applicant's line extends from Youngstown southerly to Leetonia, 19.15 miles, and a branch extends from Columbiana Junction to Signal Junction, 6.45 miles. This branch was constructed in 1930 without securing a certificate of public convenience and necessity from us." (p. 699)
>
> "The applicant is not owned or controlled by any other carrier and is not operated as a part of a general steam-railroad system of transportation." * * *
>
> "Under the circumstances we are of the opinion that the applicant is still an interurban electric railroad within the meaning of Section 1(22) of the Act; that it is not operated as a part of a general steam railroad system of transportation, and that we are without jurisdiction over the present application." (p. 700)

The Coal Company's Private Enterprise.

The construction by the Coal Company of its preparation plant at Brush Run and the appurtenant plant tracks followed all of these matters recited above. The method of operation of the plant and its appurtenant tracks has already been described and its private and industrial character made clear.

It was the construction of the Brush Run plant tracks that was the subject matter of the litigation before the United States District Court for the northern district of Ohio, Eastern Division, in equity No. 4533 (*Pennsylvania Railroad Co. and Pittsburgh & Lake Erie R. R. Co.* v. *Pittsburgh, Lisbon and Western Ry. Co. et al.*), where the trunk line carriers alleged that the plant tracks were to be devoted to a common carrier use, and sought to enjoin their construction as a violation of Section 1(18) of the Interstate Commerce Act.

Plaintiffs there brought before the Court all the matters which Appellants have borrowed from the findings of fact in that case and introduced in this case for the first time on appeal. In dismissing an application for a preliminary injunction, Judge West stated in a memorandum opinion (R. 210) in respect to these matters:

> "While the Coal Co. owns all the stock of the Pittsburgh, Lisbon & Western Railroad and practically all that of the Youngstown & Suburban, and because of this and the fact that a majority of the directors of the railroads are either directors, officers, or employees of the Coal Co., the latter may be said to control the carriers, yet it can not be found from the evidence before me that the Lisbon, which is a public common carrier, is a mere agent or instrumentality of the Coal Company. Consequently I find no basis for the holding desired by the plaintiffs that the corporate entities of these defendant companies should be disregarded in order to prevent the loss to the public which the Interstate Commerce Commission evidently felt when it rejected the application of the Lisbon, would result from the extension of that railroad. And further, this privately owned and constructed track is an entirely different enterprise in point of law from the attempted extension of the Lisbon. Being, so far as the court is now advised, lawful and not within the purview of the act, it may not be adjudged unlawful through the application of the rule that corporate entities may be disregarded to prevent abuse of public rights. That rule would probably apply and the trackage, even though constructed by the Coal Co., at its own expense and on its own property, might well be held an extension of the railroad if the track were to be employed in common carriage. For that would be the kind of extension within the purview of the law, and without commission consent it could not properly be made by the Coal Co., the sole stockholder of the Lisbon, any more than by the railroad itself."

And in dismissing the Bill of Complaint by final decree (R. 211), the same judge concluded *inter alia* as a matter of law (R. 217) that:

"3. That the construction and operation of said private railroad tracks by defendant Pittsburgh Coal Company, for its own purposes, is not within the provisions of Section 1, paragraph 18 to 22 of the Interstate Commerce Act requiring a certificate of public convenience and necessity first to be obtained from the Interstate Commerce Commission in certain instances, nor can the before-mentioned private railroad tracks of the defendant Pittsburgh Coal Company be deemed or construed to be an extension of the lines of the common carrier defendant, Pittsburgh, Lisbon & Western Railroad Company, within the meaning of said Act.

"4. That the construction of said private railroad tracks by the defendant Pittsburgh Coal Company for its own use is not a violation of the order of the Interstate Commerce Commission, of March 16, 1929, denying the certificate of public convenience and necessity prayed for by the Pittsburgh, Lisbon & Western Railroad Company to construct branch lines in the proceedings cited as 'Construction of Branches by Pittsburgh, Lisbon & Western Railroad Company', 150 I. C. C. 43; 150 I. C. C. 619.

"5. That the privately owned and constructed track of the Pittsburgh Coal Company is an entirely different enterprise in point of law from said proposed extension of Pittsburgh, Lisbon & Western Railroad.

"6. That the privately owned and operated track of the defendant Pittsburgh Coal Company is a lawful enterprise and being lawful may not be adjudged unlawful through the application in this case of the rule that corporate entities may be disregarded to prevent abuse of public rights.

"7. That there is no equity in the complainants' Bill of Complaint or Supplemental Bill of Complaint, and the same should be dismissed at the costs of the complainants."

The Coal Company's enterprise is not the same thing as the once proposed Lisbon extension either in Law or Fact.

Can it be said, as Appellants infer, that the use by the Coal Company of its Brush Run plant with its private

tracks is the same thing in law or in fact as the once proposed Lisbon extension in 1929. We submit that both in fact and law the two are different, and that a comparison will show that the differences between the once proposed extension of the Lisbon and the Coal Company's industrial activities are both real and substantial.

The Lisbon is a common carrier, chartered to do a common carrier business, which it does in fact. As it engages in interstate commerce, its activities are subject to both State and Federal regulation. Its proposed extension, as will appear by reference to the report of the Commission in 150 I. C. C. 43, was designed to serve the public in the common carriage in interstate commerce of the goods of all who offered them for transportation. It contemplated transporting a very large tonnage of coal *to* and a large tonnage of finished steel products *from* those Youngstown industries who supported its application. (See 150 I. C. C. 43.) In its proposed extension it could have employed the power of condemnation by the right of eminent domain.

The Coal Company, on the other hand, is a purely private industrial company. It is not in fact a common carrier, and it has no charter power to engage in a common carrier business. In fact it transports no one's property except its own. It has no prospect of transporting the large tonnage of coal shipped by Youngstown industries from their own mines or of transporting their finished steel products. The property which it does transport has been extracted from its own coal mines by its own mining operations. It buys no coal for the purpose of transporting it.

The Coal Company neither carries the goods of others for hire directly or indirectly, nor does it hold itself out to perform such services for hire. It has none of the attributes of a common carrier.

When the Coal Company moves its run of mine coal either over its mine tracks or in its river barges or over its plant tracks to the Brush Run plant, it is not making a common carrier use of any of its facilities. No other company is

permitted to, nor has any other company the right to, use the private transportation facilities of the Coal Company. The acquisition of those facilities came about by private purchase without aid of the power of eminent domain, a power which the Coal Company does not have.

It is not our purpose here to argue the issues raised in the case decided by Judge West which involved the legality of the construction and operation of the plant tracks; but we point out that paragraph (1) of Section 1 of the Interstate Commerce Act limits the application of the Act and the jurisdiction of the Commission to common carriers, in fact or in law; that Section 1 (9) of the Act expressly recognizes the legality of private tracks built by shippers, and guarantees to the private tracks of an industry the right to connect with the line of an interstate common carrier. See *Cleveland C. C. & St. L. Ry. Co.* v. *U. S.*, 275 U. S. 404. Clearly, as Judge West held, the construction and operation by the Coal Company of its Brush Run plant and its plant tracks are not within the purview of the Interstate Commerce Act because the use is not one of common carriage, involves no common carrier, and does not involve interstate commerce but rather a private carriage which is incidental to the processing of a raw and unrefined commodity at the end of the movement. See *The Pipe Line Cases, United States* v. *Uncle Sam Oil Company*, 234 U. S. 548.

There is no Evasion of the Interstate Commerce Commission's Order or of Interstate Freight Rates.

With respect to the Appellants' statement that the Coal Company has violated the order of the Interstate Commerce Commission in 1929, denying the application of the Lisbon for permission to extend its lines, the nature of the Commission's order should be noticed. That order (entered at 150 I. C. C. 619) is purely negative in character, and we respectfully submit that it could not have

been violated even by the Lisbon whose application it refused. This Court stated, in the case of *Piedmont and Northern Ry. Co.* v. *U. S.*, 280 U. S. 469, respecting a similar order of the Interstate Commerce Commission denying an application of a common carrier for an extension of its lines under Section 1 (18-22) of the Interstate Commerce Act:

> "The order is entirely negative. It is not susceptible of violation and cannot call for enforcement. It does not finally adjudicate the railway's standing; nor does it enjoin it to do or refrain from doing anything."

As to the broader charge that the Coal Company is evading lawful interstate freight rates and inferentially some policy contained in the Interstate Commerce Act, we would remind Appellants that the route of the private movement of the Coal Company's coal is not at all the route of these Appellants to which their rates apply; that private carriage of one's own product on one's own land by one's own vehicles to a carrier of the shipper's own choosing is a perfectly lawful activity.

It is axiomatic that one may avail himself to the full of what the law allows him to do, and in so doing, he cannot be charged with evasion of a statute. The Interstate Commerce Act does not forbid by language or condemn by policy such private carriage of one's own goods. In such circumstances the question of evasion is beside the point. In *Bullen* v. *Wisconsin*, 240 U. S. 625, Mr. Justice Holmes said with respect to evasion:

> "We do not speak of evasion, because when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion, what is meant is it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."

Could it possibly be said that a person is evading freight rates by choosing to carry privately the product of his own industry over his own land by rail or truck (or even by wheelbarrow) to any point he sees fit before he ships that product over a carrier? We respectfully submit that it is impossible to evade or violate an order that is not susceptible of violation, and that it is impossible to evade an interstate freight rate by an activity that is wholly without the scope and policy of the Interstate Commerce Act.

Appellants misconstrue the Southern Pacific Terminal Company case.

The error pervading the Appellants' argument respecting evasion is illustrated by the case of *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and Young,* 219 U. S. 498, upon which they place great reliance at Pages 39-43 of their brief. They fail to note the public character of the terminal facilities there involved and the fact that those facilities were in fact devoted to a public use.

In that case the Southern Pacific Terminal Company was chartered for the express purpose of taking over and operating certain land as a *public terminal* in conjunction with the Southern Pacific Railroad System. That land was pledged by its very conveyance to a public use for wharfage purposes; and by municipal ordinance as well as by statute expressly subjected to the same use.

The Court there pointed out:

> "* * * that the terminal facilities contemplated by the ordinance of the city of Galveston and the act of the legislature of Texas confirming it *were public terminal facilities,* not those which might be granted or withheld in preferences or discriminations." (P. 525; italics ours)
>
> * * * * * * * *
>
> "It is clear, therefore, that it was the purpose of the ordinance and of the act confirming it to secure shipping facilities for the city, *open, to public use;* and nec-

> essarily so, for the property was to be the terminal of a railroad and steamship system. It may be, as it is contended, that there was no necessity for the ordinance, 'except for the purpose of a valid relinquishment of the municipal right, often asserted by it, of opening streets through the bay-front property and constructing wharves thereon.' The relinquishment was treated as valuable, and Huntington *pledged the property to a public use* as a consideration of it. And, as we have said, such use was also a condition expressed in the act of the legislature." (P. 518, italics ours)

Part of this land the Terminal Company shut off from public use, and leased to one Young at such a favorable rental that he was given a decided business advantage over his competitors, who were forced to pay the Terminal Company's regular public wharfage rates. The facts clearly show that the Terminal Company, over this land, was engaged in a public business in interstate and foreign commerce. Young likewise was engaged in interstate commerce and frequently allowed the public to use at a fixed charge the properties which had been leased to him.

In a suit brought to enjoin the preference, it was held that the Interstate Commerce Commission had jurisdiction to enjoin the preference arising from the lease to Young, although the Terminal Company was not a chartered railroad company.

The following comparisons which the Appellants did not make are pertinent:

(1) The wharfage facilities which the Terminal Company operated were pledged and devoted to a public use, and required by statute to be open to the public. The public had a legal right to use the land leased to Young upon equal terms with him.

The private transportation facilities of the Coal Company are wholly private to it alone, and have never been otherwise. The public does not have and never has had a right to use or put foot upon any of its facilities.

(2) The Terminal Company in fact conducted a public wharfage business for the public generally over its wharfage facilities; it had by practice a factual utility status. The wharf was in fact a public facility.

The Coal Company does not and never did carry anyone's goods except its own upon its private transportation facilities; and it does not and never has permitted any common carrier or anyone else to use those facilities. They are in fact and law wholly private.

(3) When the Terminal Company took part of the wharfage facilities and by a lease to Young shut off that part from public use, it was committing a fraud on public rights.

The Coal Company's private facilities are owned by it in fee simple and have always been owned and operated by it solely in its own business for the transportation of a product which, even before its extraction from the ground, always belonged to the Coal Company.

(4) Both the Terminal Company and Young were engaging in interstate or foreign commerce over the wharfage facilities.

The coal that is moved by the Coal Company over its facilities is not in commerce; it is moved not to market but for preparation for market. See brief of Appellees, Public Utilities Commission of Ohio, and John W. Bricker, Attorney General of the State of Ohio, Pages 18-33; The Pipe Line Cases, *U. S.* v. *Uncle Sam Oil Company*, 234 U. S. 548.

(5) The commodities which were handled over the wharfage facility by the Terminal Company and by Young were delivered to that facility by a common carrier railroad, the Galveston, Harrisburg and San Antonio Railway. Those commodities, therefore, had been committed for shipment to a common carrier railroad for transportation in commerce before their arrival at the wharfage facilities.

In the instant case the run of mine coal reached the Brush Run preparation plant by a movement over non common carrier transportation facilities purely private to the Coal Company alone. The run of mine coal so transported to the Brush Run plant was never committed for shipment in commerce to a common carrier, and was not the subject of barter or sale.

(6) The acts of the Terminal Company were within the scope and policy of the Interstate Commerce Act, which clearly condemns the granting of a preference or discrimination by a common carrier. The Terminal Company was in fact a common carrier handling goods which were in interstate or foreign commerce when they passed over the wharfage facility; and the lease to Young was plainly a discrimination against the shipping public and a preference to him.

The use by the Coal Company of its Brush Run plant and plant tracks is not at all within the purview or the policy of the Interstate Commerce Act, which has no application to the purely private carriage of one's own goods on one's own land.

No doubt the reason for Appellants' reliance upon the *Southern Pacific Terminal Company Case* is due to the fact that the Court there disregarded the separate entity of the Terminal Company in reaching a fraud which had been committed. That action was taken by the Court in pursuance of the equitable doctrine that a court of equity will disregard the entities of related corporations where necessary to prevent a fraud on a statute. The principle does not have application, however, simply because one corporation owns the capital stock of another or because there is a community of officers or directors between the two corporations, with the resulting control made possible by the existence of those relationships.

It is well settled that the ownership by one corporation of all the capital stock of another corporation does not in

law make the two corporations one or result in their separate entities being disregarded. *Pullman's Palace Car Co.* v. *Missouri Pacific R. Co.*, 115 U. S. 587.

It is also true that identity of officers or directors of two corporations does not establish identity of the corporations. *Haskell* v. *McClintic-Marshall Co.*, 289 Fed. 405; *Pittsburgh and Buffalo Co.* v. *Duncan*, 232 Fed. 584; *Corsicana National Bank* v. *Johnson*, 251 U. S. 68.

Likewise, the entities of a group of corporations closely related by stock ownership and by agents and employees common to both corporations will not be disregarded because of loans made by one of the corporations to the other. *Peterson* v. *Chicago R. I. & P. R. Co.*, 205 U. S. 364.

The exercise of control by one corporation over another does not result in the application of the doctrine by which the separate entities of corporations affiliated by stock ownership or otherwise are disregarded. The additional element of fraud or wrong-doing is also necessary before resort is had to such extraordinary action.

Mr. Powell, in his book on "Parent and Subsidiary Corporations", says concerning the elements that are indispensable to an application of the doctrine:

> "* * * the whole basis of the doctrine of disregarding the corporate entity logically requires that the proof must show not only an excessive control over the subsidiary but the actual exercise of that control in such a manner as to defraud or wrong the complainant.
>
> Taking up the cases on this point we find the question of fraud or wrong very generally interwoven by the courts in their discussions of the facts and of the law." (p. 40)

After quoting from numerous cases to illustrate his statement, the author states:

> "The courts in five jurisdictions have squarely held and pointed out that this element of fraud or wrong is necessary: California, Washington and the United States Circuit Courts of Appeals for the Fifth, Sixth

and Ninth Circuits, respectively. One jurisdiction—the United States Circuit Court of Appeals for the Second Circuit—has rendered an opinion that might be construed to the contrary, though it is not believed that the Court so intended." (p. 42)

That conclusion is well supported by the following cases, in which the question of the necessary elements to the application of the doctrine was clearly raised: *Gledhill* v. *Fisher & Company* (Supreme Court of Michigan), 262 N. W. 371; *Continental Securities & Investment Company* v. *Rawson,* 208 Cal. 228; *New York Trust Company, et al.,* v. *Carpenter, et al.,* 250 Fed. 668 (C. C. A. 6th); *Hooper-Mankin Company,* v. *Matthew Addy Co.,* 4 Fed. (2nd) 187 (C. C. A. 6th); *William Wrigley, Jr. Co.* v. *L. R. Larson, Jr. Co.,* 5 Fed. (2nd) 731.

In the *Southern Pacific Terminal Company Case* this Court, in disregarding the corporate entity of the Southern Pacific Company, did not deviate from the principles above stated. It should be observed that the facts in that suit presented a proper case for the application of the doctrine that a court of equity will disregard the separate entities of related corporations where and to the extent necessary to prevent a fraud on public rights.

The action of the Southern Pacific Terminal Company (which as has been shown, did a public business in fact, and engaged in interstate commerce as a common carrier) in shutting off the public from a wharfage terminal facility devoted both in fact and in law to public use, and in giving to one shipper a preferential lease of that part of the facility from which the public had been excluded, was clearly a fraud on public rights within the purview of the Interstate Commerce Act.

In the instant case, however, no facts exist respecting which it can be said that the Coal Company or the Lisbon or the Y. & S. has taken any action which offends the language or policy of the Interstate Commerce Act. Such as-

sertions as the one that the movement of the Coal Company's run of mine coal to its Brush Run preparation plant in Ohio is a method "adopted to achieve forbidden advantage," and that it bears "resemblance" to the facts of the Southern Pacific Terminal Case do not take the place of analysis. The Appellants do not point to facts showing fraud or evasion, because no such facts exist; they do not show where in the instant case there is anything offensive to the language or policy of the Interstate Commerce Act, because they know quite well that the private enterprise of the Coal Company is wholly without the scheme of regulation of the Act.

CONCLUSION.

It is apparent from the record in this case that the purpose underlying the Coal Company's private enterprise, which involves the movement of its run of mine coal by its cheap river and private track transportation to its Brush Run plant, is the improvement of its business position in the northeastern Ohio coal markets. There is nothing unlawful in such a purpose. The record also makes clear that these private transportation facilities are private in fact as well as in law; that no one except the Coal Company has any interest or participation in their ownership or use; that the movement of the Coal Company's run of mine coal over those transportation facilities to the Brush Run plant is not a transportation in interstate commerce within the purview of the Interstate Commerce Act; that the entire activity of the Coal Company in so transporting, processing and thereafter marketing its coal is wholly lawful and not within the scope or policy of that Act; that the Coal Company is doing only what it and any other industrial company has a lawful right to do in the precise manner that Congress has recognized and endeavored to foster by section 1 (9) of the Interstate Commerce Act.

We submit that there is no fraud; that the charge that interstate freight rates are being evaded is unfounded; that the ownership by the Coal Company of the stock of the Lisbon and the Y & S is irrelevant to the issues of the case; that interstate freight rates for services performed by a common carrier do not apply, and are not intended to apply, to a purely intrastate transportation because of previous movement of a commodity that is wholly private both in fact and in law.

This Appellee submits that the decree below is correct and should be affirmed.

Respectfully submitted,

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APPENDIX.

The Interstate Commerce Act (Title 49, U. S. Code).

SECTION 1. (1) *Carriers subject to regulation.* The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *

SECTION 1. (2) *Transportation subject to regulation.* The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid; * * *

SECTION 1. (3) *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the

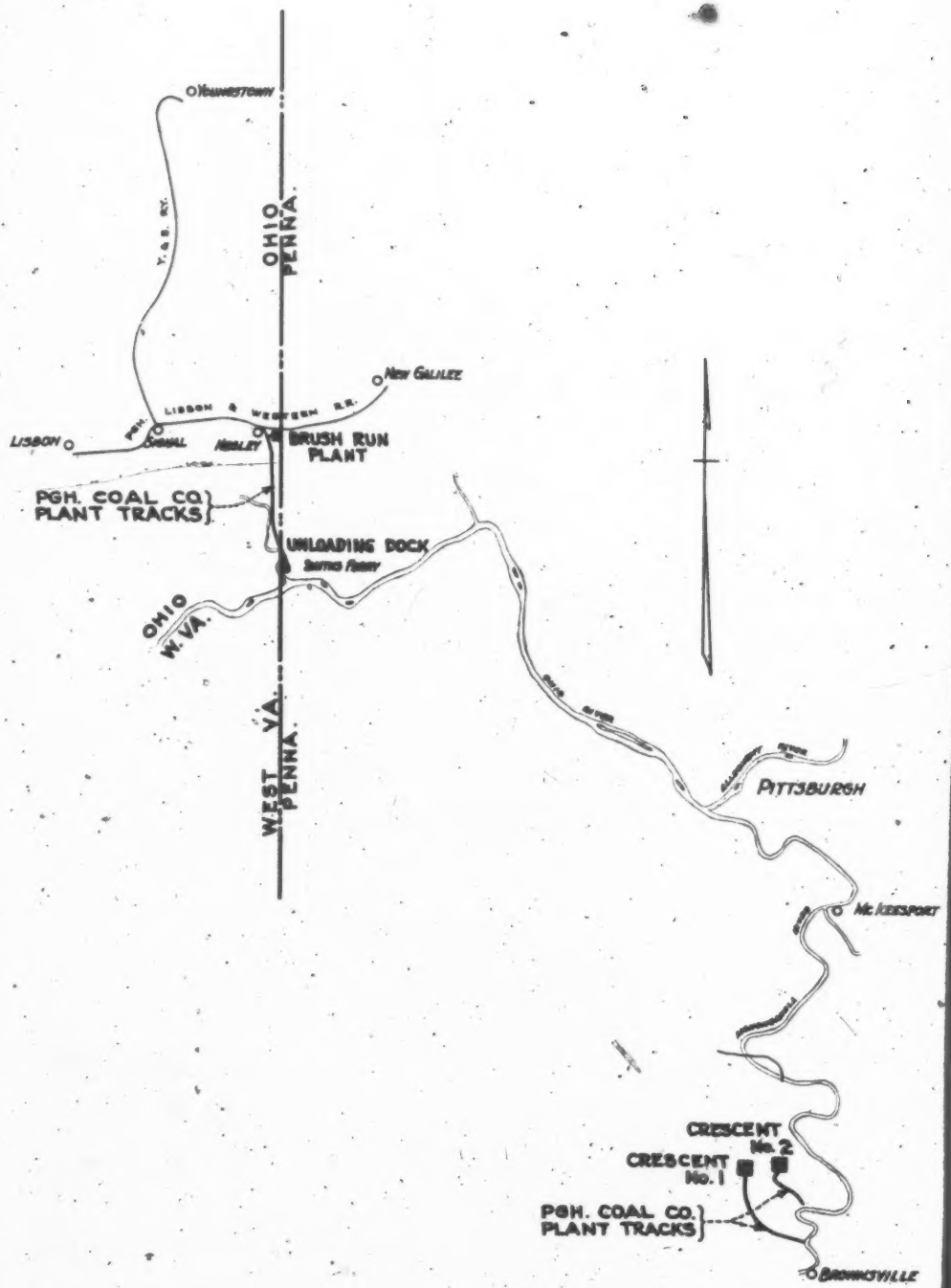
transportation of the persons or property designated herein, including all freight depots, yards and grounds, used or necessary in the transportation or delivery of any such property. * * *

SECTION 1. (9) *Switch connections and tracks.* Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section 13 of this chapter, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this chapter, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.

SECTION 1. (18) *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall

acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

SECTION 1. (22) *Construction, etc., of spurs, switches, etc., within State.* The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.


YOUNGSTOWN
Y. & S. RY.
OHIO
PENNA.
NEW GALILEE
LISBON & WESTERN R.R.
PGH.
LISBON
SIGNAL
ASHLEY
BRUSH RUN
PLANT
PGH. COAL CO.
PLANT TRACKS
UNLOADING DOCK
SMITHS FERRY
OHIO
W. VA.
WEST VA.
PENNA.
PITTSBURGH
MC KEESPORT
CRESCENT
No. 2
CRESCENT
No. 1
PGH. COAL CO.
PLANT TRACKS
BROWNSVILLE